

December 27, 1995

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Re: Alison Moffat v. Hennepin County; OAH Docket No. 11-1700-9528-2

Dear Counsel:

I would like to address several outstanding matters in this letter.

First, I have reviewed the transcript of the Ricki Roberts deposition and have carefully considered the argument of counsel. It appears that counsel for the County questioned the witness for more than two hours and then announced at approximately 3:48 p.m. that she would have to leave to attend a meeting at 4:00 p.m. There apparently had been no previous mention of time constraints. Counsel for the County made several objections to the questions asked by counsel for the Complainant based on arguments that they were leading in nature, exceeded the scope of her previous examination, or exceeded the five-minute estimate counsel for the Complainant had previously provided. Counsel for the County then engaged in a colloquy with counsel for the Complainant and terminated the deposition at 3:56 p.m., after the Complainant had asked twelve questions. The Complainant had not completed her questioning of the witness at that point.

The rules governing contested case proceedings indicate that "[a]ny means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota is allowed." Minn. R. 1400.6700, subp. 2 (1993). Minn. R. Civ. P. 30 permits the taking of depositions of witnesses upon oral examination. Generally, the attorney who did not notice a deposition is permitted to question the witness in areas relevant to the case, even if such areas differ from those covered by the attorney who noticed the deposition. The additional examination thus is not strictly limited to the scope of the initial examination. D. Herr and R. Haydock, Minnesota Practice §30.17 (1985), provides a explanation of customary practice in this area:

After the attorney who noticed the deposition has completed his or her examination, any other attorney present may question the deponent. The

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nature of such additional examination will depend upon the purpose for such questions and the relationship between the deponent and the attorney. If the attorney represents other parties to the case, the examination will cover areas not covered in the initial examination which reveal relevant matters. If the attorney represents the deponent, questions may be limited to clarify previous responses or to rehabilitate the deponent, if necessary. The rules do not restrict these examinations, although tactical and strategic decisions will. The rules also do not provide guidance regarding who should bear responsibility for the cost involved in this additional examination. The attorney who noticed the deposition will continue to assume the responsibility for the expenses for the court reporter. It is customary to allow the attorney representing the deponent to ask some clarification and rehabilitation questions. If this examination become extensive, or if other attorneys examine the deponent, these individuals should become obligated to pay a fair share of the deposition cost. See Wheeler v. West India Steamship Co., 11 F.R.D. 396 (S.D.N.Y. 1951); Baron v. Leo Feist, Inc., 7 F.R.D. 71 (S.D.N.Y. 1946).

The Complainant was entitled to ask relevant questions of Ms. Roberts which were not restricted to the areas into which the Complainant inquired, and the length of her examination should not have been so severely limited. There is no evidence that the Complainant's examination was conducted in bad faith or in any other manner that would justify the termination of the deposition under Minn. R. Civ. P. 30.04. As a basic courtesy, counsel for the County should have informed counsel for the Complainant in advance of the deposition of her time constraints and, if necessary, counsel could have selected another date for the deposition. Under these circumstances, I will require Hennepin County to reconvene the deposition at the County's expense and pay Ms. Roberts' witness and mileage fee. Counsel should contact each other and arrange a convenient time and date for the deposition. Should the Complainant's examination of Ms. Roberts become lengthy and exceed forty-five minutes, I encourage counsel to agree to share the cost of the reconvened deposition. If they cannot reach such an agreement, the matter may be presented to me by written motion.

Second, it is my understanding that Hennepin County has withdrawn its motion for an order regarding the protocols to be produced by Ms. Scherz-Busch but wishes a ruling regarding other matters raised by counsel for the County in her letter of December 22, 1995, and the earlier motion. I do not feel that it would be appropriate to order production of Ms. Scherz-Busch's report by a particular date. Counsel for the Complainant has not yet received the report, and I have not been provided any information regarding when the report will be issued. It is my understanding that counsel for the Complainant has indicated that she will send a copy of the report as soon as she receives it, and I trust that

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she will do so. In addition, I do not believe that it is necessary at this point to “order” counsel for the Complainant to return phone calls or faxes received from the County, nor do I feel that I have an adequate basis for concluding that counsel for the Complainant has been intentionally delaying in responding to the County. I will again remind both counsel of my expectation that they will act in a professional and courteous manner. Counsel obviously must provide prompt responses to communications that are received and otherwise act in accordance with reasonable standards of conduct. If this standard is breached in the future, it should be brought to my attention.

There must be a reasonable amount of cooperation between the parties to enable them to bring discovery to a close and prepare for trial in this matter. It is apparent that the attorneys in this matter are experiencing some difficulty in working with each other. I expect you to put this personal animosity aside and work together in a civil manner.

Very truly yours,

BARBARA L. NEILSON  
Administrative Law Judge